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No. 08-1292

Supreme Court, U.S.
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IN THE

United States Supreme Court

LUIS ACOSTA,

Petitioner,

v.

CITY OF PHOENIX,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR REHEARING

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TABLE OF CONTENTS

	Page
Table Of Contents	i
Table Of Authorities	ii
Luis Acosta's Petition for Rehearing	1
City of Phoenix and Laborers International, Local 777, have combined to exclude Luis Acosta from Local 777	1
CONCLUSION	6
CERTIFICATION	7

TABLE OF AUTHORITIES

Statutes *Page(s)*

City of Phoenix "Meet and Confer Ordinance," Article XVII, "Employer-Employee Relations," Division 1, "Meet and Confer," Phoenix City Code 2

Sec. 2-209 4

Sec. 2-210(11) 4

Sec. 2-210(12) 4

Sec. 2-214(A) 2,3

LUIS ACOSTA'S
PETITION FOR REHEARING

City of Phoenix and Laborers International, Local 777, have combined to exclude Luis Acosta from Local 777.

About eight years ago, Petitioner, Luis Acosta, resigned from Local 1297 (now, Local 777) of the Laborers International Union of North America, AFL-CIO, in a dispute over blacklisting and general lack of union support—never dreaming Local 1297 (777), would thereafter assert against him, the pretended power to exclude him from union membership. To Mr. Acosta's knowledge, he (a Mexican-American) is the only member of the bargaining unit ever excluded from union membership.

Luis Acosta's Petition for a Writ of Certiorari was filed with the court 15 April 2009. The Petition's thrust was national-origin discrimination in the workplace, by Mr. Acosta's employer, the City of Phoenix. Specifically, Mr. Acosta asserted workplace segregation, harassment, retaliation, supervision by unqualified persons, and a lack of employee performance review goals—all contributing to and creating what could be called a hostile work environment (although Mr. Acosta seems not to have used that precise term). [Petition, at 4-5].

The single most serious of Mr. Acosta's complaints was undoubtedly workplace segregation: being kept outside his work unit, alone and isolat-

ed, "in a secure[,] CAGED area of a WAREHOUSE!" [Petition, at 5 (emphasis in the original)].

On 21 April 2009, Mr. Acosta's Petition for Certiorari having been filed for less than a week; the Phoenix Employment Relations Board (PERB) dismissed his Unfair Employee Relations Practice Charge against Local 777 of International Laborers, dealing with that union's most recent denial of membership, which occurred on 14 January 2009.

Mr. Acosta's case, the PERB Board agreed, was a case of first impression for them—the PERB never before having heard a case against a labor union! Petitioner's counsel has obtained an audio recording and transcript of the PERB hearing, at the conclusion of which Mr. Acosta's unfair labor practice charge was dismissed.

Mr. Acosta had invoked PERB jurisdiction under Sec. 2-214 (A) of the City of Phoenix's "Meet and Confer" Ordinance. Subsection (A) of Sec. 2-214, "Public Employee Rights," reads in pertinent part, as follows:

> "Public employees shall have the right to form, join and participate in any employee organization of their choosing, or to refrain from forming, joining, or participating in same."

Notwithstanding Sec. 2-214(A) of the Meet and Confer Ordinance, the PERB Board agreed unanimously Mr. Acosta had no right to join Local 777;

and that relief from the union's eight-year exclusion, if any, would have to come from the union itself.

Before applying to PERB for relief from that eight-year exclusion, Mr. Acosta, a Phoenix resident, as well as Phoenix employee, had brought his continuing exclusion to the attention of the Phoenix City Council, Local 777's contracting partner—as a probable violation of both contract and city ordinance. The City Council declined to interpose in what they viewed as an internal union matter, citing a city ordinance to that effect.

So scrupulous was the City Council on this point—not interfering with union business—that the Council evidently did not think it proper even to address a request to Local 777, asking the union to re-examine its continuing exclusion of Mr. Acosta in light of Sec. 2-214(A); or expressing a wish, or even just a hope, that a way be found to re-admit Mr. Acosta to union membership, should the public interest appear to allow it.

In his Petition for Certiorari, Mr. Acosta argued [Petition, 6 and 8] the EEOC had effectively sidelined itself, regarding charges of discrimination by City of Phoenix employees—by referring those complaints to the City itself, without so much as requesting a response from the City.

Similarly, both the City and Local 777 have managed to gut the "Meet and Confer" Ordinance of any substance, at least as regards Mr. Acosta, by acting together to deny him union membership. According

to at least one PERB member, the Public Member, Peter N. Maydanis, exclusion from union membership is a union's "unfettered right"!

Under Phoenix's Meet and Confer Ordinance, employee unions do far more than adjust employee grievances under a grievance procedure. They also enter into collective bargaining agreements, called "Memoranda of Understanding," with the City, concerning the bargaining unit members' (both union members' and non-members') wages, hours and other terms and conditions of employment—including job security and the grievance procedure, which enforces it. [Sec. 2-209 (last paragraph, 2-210(11) and (12)]. Agreements reached, between City and union, are then presented to City Council and the affected union's membership for approval. [Sec. 2-210(12)].

Needless to say, non-members of Phoenix unions have no say—not little say, but none at all—in the selection of bargaining representatives, negotiating instructions or contract approval. Nor do non-members of Phoenix unions have a say in union governance, upon which so much depends, or upon the quality of the representation they receive (if any) concerning the grievances they file.

So, Mr. Acosta has been shorn of his two chief defenses against discrimination in the workplace, the EEOC and his own union. This double vulnerability has led ***directly*** to aggression against Mr. Acosta **by *both City and union***.

The City's discriminatory acts have already been discussed—above, and in the Petition for Certiorari [Petition, at 4-5]. Local 777 (formerly, Local 1297) has also piled on, with so-called "group grievances" against Mr. Acosta, which the union then invites ***city management*** to assist in adjudicating, under the grievance procedures of the collective bargaining agreement!

"Group grievances" are those submitted by two or more union members—apparently, against anyone, union member or non-member, labor or management. The point is, however: these group grievances are a useful means of ***union discipline***—useful against both union members ***and*** non-members, such as Mr. Acosta.

Remedies against the employee subjected to a group grievance include any in ***management's*** arsenal—as if these group grievances were really claims of workplace infractions, being initiated and pursued by management, alone. At one point, the union's business manager told Mr. Acosta directly, "Louie, they want to fire you!"

The District Court was evidently so impressed by the group grievances, used by the union against Mr. Acosta, that that court opens its opinion and order with lengthy quotations from them. [Petition, App. 5-6]. But the District Court failed to acknowledge the ***context*** for the union's direct aggression against Mr. Acosta: his whistle-blowing activities with state and federal regulators, concerning City environmental violations, which some in the union

felt (whether reasonably or not) threatened their job security.

Local 777 even disapproves of Mr. Acosta's appearances before the Phoenix City Council, evidently believing they trench on union prerogatives!

Without his union's assistance and support, and EEOC's diligence and impartiality, Mr. Acosta's resort must be to the courts. In his Reply Brief [Pages 6-8, 14], Mr. Acosta suggested a remand to the Ninth Circuit, for clarification on the timeliness issue—in case this court did not feel Mr. Acosta's case ripe for adjudication.

CONCLUSION

For the reasons set forth above, this court should grant Mr. Acosta's Petition for Rehearing, and then proceed to either consider the cause on its merits, or to remand it to the Ninth Circuit for clarification on the timeliness issue.

Dated: July 10, 2009

Respectfully submitted,

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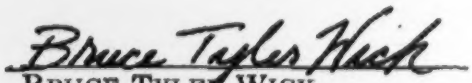
RULE 44 CERTIFICATION OF COUNSEL

This will certify that this Petition for Rehearing is restricted to the grounds set forth in Rule 44(2); namely, that the Petition is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds, not previously presented. Further, I certify this Petition for rehearing is presented in good faith and not for delay.

Dated: July 10, 2009



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